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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 RICHARD MITTLESTADT,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

15 Defendant.

CASE NO. 10cv5416-RJB-JRC

REPORT AND RECOMMENDATION

Noted for July 8, 2011

16
17 This matter has been referred to United States Magistrate Judge J. Richard Creatura
18 pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as
19 authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261, 271-72 (1976). This
20 matter has been fully briefed (see ECF Nos. 16, 21, 22).

21 After considering and reviewing the record, the undersigned finds that the administrative
22 law judge failed to consider properly the lay testimony by failing to provide reasons germane to
23 the testimony of plaintiff's mother and wife sufficient to reject these opinions. The
24 administrative law judge also committed legal error when evaluating the medical evidence by
25 substituting his own interpretation of the medical evidence over that of the examining physician,
26 Dr. Clem, and by failing to provide specific and legitimate reasons to reject Dr. Clem's opinions.

1 BACKGROUND

2 Plaintiff, RICHARD MITTLESTADT, worked for many years as a carpenter in the
3 construction industry (see Tr. 50-51). As he described it, he “took piles of lumber and turned
4 them into houses” (Tr. 51). As assessed by one of his doctors, due “to his large size and muscular
5 nature, he has tended to lift and move incredibly heavy objects throughout the years,” likely
6 causing him to suffer from chronic pain (Tr. 168). Plaintiff has suffered several traumatic injuries
7 to various areas of his body and was thirty-eight years old on his alleged disability onset date of
8 February 15, 2001 (see Tr. 24, 50, 145).
9

10 PROCEDURAL HISTORY

11 On December 13, 2004, plaintiff filed an application for a period of disability and
12 disability insurance benefits, alleging disability beginning February 15, 2001 (Tr. 50). Plaintiff’s
13 claim was denied initially on May 12, 2005 (Tr. 26) and following reconsideration on October
14 10, 2005 (Tr. 25, 42). On October 15, 2007 plaintiff received his requested hearing before
15 Administrative Law Judge M. J. Adams (hereinafter “the ALJ”) (Tr. 247-74). Plaintiff and his
16 wife, Ms. Annette M. Mittlestadt, testified at this hearing (id.). On December 27, 2007, the ALJ
17 issued a written opinion finding that plaintiff was not disabled pursuant to the Social Security
18 Act from February 15, 2001 through the date of the decision (Tr. 24).
19

20 On April 22, 2010, the Appeals Council denied plaintiff’s request for review, making the
21 December 27, 2007 written decision by the ALJ the final agency decision subject to judicial
22 review (Tr. 4-6, 7). See 20 C.F.R. § 404.981. On June 17, 2010, plaintiff filed a complaint in this
23 Court seeking judicial review of the December 27, 2007 decision of the ALJ. On November 16,
24 2010, plaintiff filed an opening brief (ECF No. 16). Defendant filed a responsive brief on
25 January 27, 2011 (ECF No. 21) and plaintiff filed a reply on February 10, 2011 (ECF No. 22).
26

STANDARD OF REVIEW

Plaintiff bears the burden of proving disability within the meaning of the Social Security Act (hereinafter “the Act”). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (*citing* Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995)). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment “which can be expected to result in death or which has lasted, or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff’s impairments are of such severity that plaintiff is unable to do previous work, and cannot, considering plaintiff’s age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also* Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

Pursuant to 42 U.S.C. § 405(g), this court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”” Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting* Davis v. Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see* Richardson v. Perales, 402 U.S. 389, 401 (1971).). The Court ““must independently determine whether the Commissioner’s decision is (1) free of legal error and (2) is supported by substantial evidence.” *See* Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing* Moore v. Comm’r

1 of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen v. Chater, 80 F.3d 1273,
2 1279 (9th Cir. 1996).

3 However, “regardless whether there is enough evidence in the record to support the
4 ALJ’s decision, principles of administrative law require the ALJ to rationally articulate the
5 grounds for h[is] decision and [the courts] confine our review to the reasons supplied by the
6 ALJ.” Steele v. Barnhart, 290 F.3d 936, 941(7th Cir. 2002) (*citing* SEC v. Chenery Corp., 318
7 U.S. 80, 93-95 (1943) (other citations omitted)); *see also* Stout v. Commissioner of Soc. Sec.,
8 454 F.3d 1050, 1054 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a ground
9 that the agency did not invoke in making its decision”) (*citing* Pinto v. Massanari, 249 F.3d 840,
10 847 (9th Cir. 2001) (*citing* Chenery Corp., 232 U.S. at 196)); Griemsmann v. Astrue, 147 Soc.
11 Sec. Rep. Service 286, 2009 U.S. Dist. LEXIS 124952 at *8, (W.D. Wash. 2009) (J. Theiler)
12 (*citing* Blakes v. Barnhart, 331 F.3d 565, 569 (7th Cir. 2003)), *adopted and remanded by* 147
13 Soc. Sec. Rep. Service 286, 2009 U.S. Dist. LEXIS 98985 (2009) (J. Zilly).

16 DISCUSSION

- 17 1. The ALJ failed to evaluate properly the lay testimony provided by plaintiff’s wife,
18 Ms. Mittlestadt, and plaintiff’s mother, Ms. Mittlestadt Heath.
19

20 Although plaintiff does not raise the issue of the ALJ’s improper evaluation of the lay
21 testimony in his introductory statement of the issues presented, he does contend in his opening
22 brief specifically that “the ALJ erroneously discounted Mr. and Mrs. Mittlestadt’s testimony”
23 (ECF No. 16, pp. 2, 10). In addition, the Court ““must independently determine whether the
24 Commissioner’s decision is (1) free of legal error and (2) is supported by substantial evidence.”
25 Bruce, supra, 557 F.3d at 1115.
26

1 Pursuant to the relevant federal regulations, in addition to “acceptable medical sources,”
2 that is, sources “who can provide evidence to establish an impairment,” 20 C.F.R. § 404.1513
3 (a), there are “other sources,” such as friends and family members, who are defined as “other
4 non-medical sources,” 20 C.F.R. § 404.1513(d)(4), and “other sources” such as nurse
5 practitioners and naturopaths, who are considered other medical sources¹, 20 C.F.R. §
6 404.1513(d)(1). See also Turner v. Comm’r of Soc. Sec., 613 F.3d 1217, 1223-24 (9th Cir. 2010)
7 (*citing* 20 C.F.R. § 404.1513(a), (d), (d)(3)).

9 An ALJ may disregard opinion evidence provided by “other sources,” characterized
10 recently by the Ninth Circuit as “lay testimony,” “if the ALJ ‘gives reasons germane to each
11 witness for doing so.’” Turner, *supra*, 613 F.3d at 1224 (*citing* Lewis v. Apfel, 236 F.3d 503, 511
12 (9th Cir. 2001)); *see also* Van Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996). This is
13 because “[i]n determining whether a claimant is disabled, an ALJ must consider lay witness
14 testimony concerning a claimant's ability to work.” Stout v. Commissioner, Social Security
15 Administration, 454 F.3d 1050, 1053 (9th Cir. 2006) (*citing* Dodrill v. Shalala, 12 F.3d 915, 919
16 (9th Cir. 1993)). Recently, the Ninth Circuit characterized lay witness testimony as “competent
17 evidence,” again concluding that in order for such evidence to be disregarded, “the ALJ must
18 provide ‘reasons that are germane to each witness.’” Bruce v. Astrue, 557 F.3d 1113, 1115 (9th
19 Cir. 2009) (*quoting* Van Nguyen, *supra*, 100 F.3d at 1467).

22 According to the Ninth Circuit, an ALJ may not rely upon a witness’ relationship or
23 abstract financial interest as a reason to discredit her testimony. Valentine v. Comm’r SSA, 574
24 F.3d 685, 694 (9th Cir. 2009). Absent “evidence that a specific [lay witness] exaggerated a
25 claimant’s symptoms *in order* to get access to his disability benefits,” an ALJ may not reject that

¹ “Other sources” specifically delineated in the relevant federal regulations also include “educational personnel,” *see* 20 C.F.R. § 404.1513(d)(2), and public and private “social welfare agency personnel,” *see* 20 C.F.R. § 404.1513(d)(3).

1 witnesses' testimony with a general finding that the witness is "an 'interested party' in the
2 abstract." Id. In addition, "where the ALJ's error lies in a failure to properly discuss competent
3 lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless
4 unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony,
5 could have reached a different disability determination." Stout, 454 F.3d at 1056.
6

7 In this case, the ALJ specifically "considered opinions of lay witnesses," including those
8 of Ms. Annette M. Mittlestadt, plaintiff's wife, and of Ms. Myra Mittlestadt Heath, plaintiff's
9 mother (see Tr. 23, 74-82, 106-108). The ALJ included the following in the written opinion:

10 [Plaintiff]'s wife completed a Function Report in January 2005 in which she
11 stated that lifting, bending, stair climbing, kneeling, walking, squatting, sitting,
12 and reaching caused increased pain. She said that his memory and
13 concentration were also impaired (Ex. 4E). [Plaintiff]'s mother wrote a letter
14 indicating that [plaintiff] is in constant pain. She stated that he relied on friends
15 and his sons to perform the harder work around the home that he used to do.
16 She said that if he exerted himself, he slept less at night and had difficulty
17 moving the next day due to pain (Ex. 11E). I have considered these opinions,
18 and note that while some of the expressed limitations are adequately addressed
19 by the limitation to a more limited residual functional capacity than his former
20 work, greater weight overall is given to the opinions of the State agency
21 medical consultants, who reviewed medical evidence in formulating their
22 opinion. I also note the allegations of [plaintiff]'s functioning contained in
23 [plaintiff]'s wife's testimony are not fully supported by the objective medical
24 evidence, as discussed in detail above.

25 (Tr. 23).

26 The ALJ gives only one reason to discount the opinions by plaintiff's mother regarding
plaintiff's constant pain and difficulties following exertion (id.). The ALJ discounted the lay
opinions of Ms. Heath because the ALJ gave greater weight to the state agency medical
consultants who reviewed medical evidence in formulating their opinion (see id.).

Lay witnesses are "other sources," and by definition are not "acceptable medical sources"
basing their opinions on medical evidence. 20 C.F.R. § 404.1513(d)(1). The Ninth Circuit
nevertheless has characterized lay witness testimony as "competent evidence," reiterating the

1 conclusion that in order for such evidence to be disregarded, “the ALJ must provide ‘reasons that
2 are germane to each witness.’” Bruce, supra, 557 F.3d at 1115. As all lay witnesses by definition
3 are not basing their opinions on medical evidence, the Court concludes that the ALJ’s decision to
4 discount the lay opinion by Ms. Heath because it was not based on a review of medical evidence
5 was not a reason germane to the particular lay witness and does not give much support for the
6 decision to discount her opinions. See id.; see also 20 C.F.R. § 404.1513(d)(1).
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8 The Court cannot conclude confidently that “no reasonable ALJ, when fully crediting the
9 testimony” provided by Ms. Heath “could have reached a different disability determination,”
10 therefore the ALJ’s error in evaluating Ms. Heath’s testimony was not harmless. Stout, 454 F.3d
11 at 1056.
12

13 The ALJ also gave this same reason of a failure to review medical evidence in support of
14 the decision to discount the lay testimony provided by plaintiff’s wife, Ms. Mittlestadt (Tr. 23).
15 Again, the Court concludes that this reason is not germane to the particular lay witness. See
16 Bruce, supra, 557 F.3d at 1115. The ALJ also supported the partial rejection of the testimony of
17 Ms. Mittlestadt by concluding that the allegations of plaintiff’s functioning contained in her
18 testimony were not fully supported by the objective medical evidence (Tr. 23). The ALJ does not
19 specify which opinion in Ms. Mittlestadt’s testimony was inconsistent with which particular
20 report in the objective medical evidence, and there are aspects of her opinion the ALJ appears
21 not to address (see Tr. 23). Based on a review of the relevant record, the Court concludes that the
22 ALJ’s conclusion in this regard is not based on substantial evidence in the record. See Bayliss,
23 supra, 427 F.3d at 1214 n.1. The ALJ’s error in evaluating the lay testimony by Ms. Mittlestadt
24 cannot be considered harmless by this Court, based on a review of the relevant record. See Stout,
25 454 F.3d at 1056.
26

1 The Court concludes that the ALJ committed harmful legal error by failing to evaluate
2 properly the lay testimony provided by plaintiff's mother, Ms. Heath and by plaintiff's wife, Ms.
3 Mittlestadt. See Bruce, supra, 557 F.3d at 1115. Therefore the undersigned recommends that this
4 matter be reversed and remanded to the administration for further consideration.

6 2. The ALJ failed to evaluate properly the medical evidence.

7 The ALJ is responsible for determining credibility and resolving ambiguities and
8 conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);
9 Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If the medical evidence in the record is
10 not conclusive, sole responsibility for resolving conflicting testimony and questions of credibility
11 lies with the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1999) (*quoting Waters v.*
12 Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*citing Calhoun v. Bailar*, 626 F.2d 145, 150 (9th
13 Cir. 1980))).

15 "A treating physician's medical opinion as to the nature and severity of an individual's
16 impairment must be given controlling weight if that opinion is well-supported and not
17 inconsistent with other substantial evidence in the case record." Edlund v. Massanari, 253 F.3d
18 1152, 1157 (9th Cir. 2001) (*citing* SSR 96-2p, 1996 SSR LEXIS 9); see also 20 C.F.R. § 416.902
19 (nontreating physician is one without "ongoing treatment relationship"). The decision must
20 "contain specific reasons for the weight given to the treating source's medical opinion, supported
21 by the evidence in the case record, and must be sufficiently specific to make clear to any
22 subsequent reviewers the weight the adjudicator gave to the [] opinion." SSR 96-2p, 1996 SSR
23 LEXIS 9. However, "[t]he ALJ may disregard the treating physician's opinion whether or not
24 that opinion is contradicted." Batson v. Commissioner of Social Security Administration, 359
25 F.3d 1190, 1195 (9th Cir. 2004) (*quoting Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
26

1 1989)). In general, more weight is given to a treating physician's opinion than to the opinions of
2 those who do not treat the claimant. Lester, supra, 81 F.3d at 830 (*citing* Winans v. Bowen, 853
3 F.2d 643, 647 (9th Cir. 1987)).

4 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
5 opinion of either a treating or examining physician or psychologist. Lester v. Chater, 81 F.3d
6 821, 830 (9th Cir. 1995) (*citing* Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991); Pitzer v.
7 Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)); *see also* Edlund v. Massanari, 253 F.3d 1152, 1158-
8 59 (9th Cir. 2001) ("the ALJ erred in failing to meet, either explicitly or implicitly, the standard
9 of clear and convincing reasons required to reject an uncontradicted opinion of an examining
10 psychologist") (*citing* Lester, supra, 81 F.3d at 830). Even if a treating or examining physician's
11 opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that
12 are supported by substantial evidence in the record." Lester, supra, 81 F.3d at 830-31 (*citing*
13 Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995)). In addition, the ALJ must explain why
14 his own interpretations, rather than those of the doctors, are correct. Reddick, supra, 157 F.3d at
15 725 (*citing* Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988)). However, the ALJ "need
16 not discuss *all* evidence presented." Vincent on Behalf of Vincent v. Heckler, 739 F.2d 1393,
17 1394-95 (9th Cir. 1984) (per curiam). The ALJ must only explain why "significant probative
18 evidence has been rejected." Id. (*quoting* Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981)).

19 An examining physician's opinion is "entitled to greater weight than the opinion of a
20 nonexamining physician." Lester, supra, 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. §
21 404.1527(d). "In order to discount the opinion of an examining physician in favor of the opinion
22 of a nonexamining medical advisor, the ALJ must set forth specific, legitimate reasons that are
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1 supported by substantial evidence in the record.” Nguyen v. Chater, 100 F.3d 1462, 1466 (9th
2 Cir. 1996) (*citing* Lester, *supra*, 81 F.3d at 831).

3 Although it is often the case that a claimant’s failure to comply with prescribed treatment
4 calls into question the severity of the claimant’s symptoms, this generally is because such failure
5 suggests that the claimant willfully is failing to submit to medical treatment because he or she
6 wishes to remain disabled and receive benefits, or because he or she is not suffering from that
7 severe of an impairment if not doing everything possible to remedy it. See 20 C.F.R. § 404.1530;
8 see also SSR 96-7 1996 SSR LEXIS 4, at *21-*22; but see Nichols v. Califano, 556 F.2d 931,
9 932 (9th Cir. 1977). However, a good reason can provide a valid excuse for not following
10 prescribed treatment, such as that a treating family physician does not recommend the treatment,
11 or that it is excessively painful or dangerous. 20 C.F.R. § 404.1530; SSR 96-7 1996 SSR LEXIS
12 4, at *21-*22; Nichols, *supra*, 556 F.2d at 933.

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15 When a mental illness is involved, assuming that a failure to comply with prescribed
16 treatment suggests a willful failure to comply with prescribed treatment can be illogical. This is
17 in part because a person suffering from a mental illness may not realize that he needs his
18 medication, or he may not even realize that his “condition reflects a potentially serious mental
19 illness.” Van Nguyen, *supra*, 100 F.3d at 1465. “[I]t is a questionable practice to chastise one
20 with a mental impairment for the exercise of poor judgment in seeking rehabilitation.” Id.
21 (*quoting* with approval, Blankenship v. Bowen, 874 F.2d 1116, 1124 (6th Cir. 1989)).
22

23 When a person suffers from a mental illness, especially a severe one such as the severe
24 mood disorder suffered by plaintiff here, (Tr. 14), and the mentally ill person does not have the
25 requisite insight into his or her condition, or does not have the memory and focus to have the
26 ability to take a medication three times a day, this fact actually can indicate a greater severity of

1 mental incapacity. See Van Nguyen, supra, 100 F.3d at 1465; see also Blankenship, supra, 874
2 F.2d at 1124. In addition, according to Social Security Ruling, (hereinafter “SSR”), SSR 96-7,
3 “the adjudicator must not draw any inferences about an individual’s symptoms and their
4 functional effects from a failure to seek or pursue regular medical treatment without first
5 considering any explanations that the individual may provide, or other information in the case
6 record, that may explain infrequent or irregular medical visits or failure to seek medical
7 treatment.” SSR 96-7, 1996 SSR LEXIS 4, at *21-*22.

9
10 a. Dr. Joseph B. Clem, M.D., examining physician

11 On April 23, 2005, Dr. Joseph B. Clem, M.D., (hereinafter “Dr. Clem”) examined
12 plaintiff. He observed that plaintiff “was deemed a good and reliable source of history” (Tr. 217).
13 Dr. Clem noted that plaintiff was not taking any psychotropic medications, but also noted that
14 during past trials of anti-depressants, including Effexor, Zoloft and nortriptyline, “none of these
15 medications proved effective for his depression symptoms” (id.). Dr. Clem explicitly conducted
16 a mental examination of plaintiff (Tr. 219-20). He observed that plaintiff “moved somewhat
17 slowly and appearing to be in pain during the interview,” among other observations (Tr. 219).
18 Dr. Clem assessed that there was “no evidence of any malingering or factitious behavior” (id.).
19 Dr. Clem assessed plaintiff’s mood as depressed, and noted that plaintiff was “quite tearful
20 through several portions of the interview, particularly when discussing not being able to work
21 full time and provide for his family” (id.).
22

23 Dr. Clem diagnosed plaintiff with mood disorder, depressed type, secondary to chronic
24 pain, among other things, and rated plaintiff global assessment of functioning at 54 (Tr. 220). Dr.
25 Clem indicated that plaintiff’s “emotional difficulties are potentially treatable, although there
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1 would be no guarantee of response” (id.). He explained that this was due to the lack of
2 appreciable effect from plaintiff’s previous medication trials (id.).

3 Dr. Clem also explicitly made work-related functional assessments (Tr. 220-21). He
4 assessed that plaintiff “might experience some problems in performing work activities on a
5 consistent basis, given the likelihood of worsening depressive episodes” (Tr. 221). Dr. Clem also
6 concluded that plaintiff “would likely experience some interruptions in maintaining regular
7 attendance in the workplace” due to exacerbation of his depression, which Dr. Clem assessed as
8 “particularly likely, given that he has had poor response to treatment for his chronic pain” (id.).
9 Finally, Dr. Clem concluded that plaintiff “would not be anticipated to overall deal well with the
10 usual stressors encountered in a competitive workplace environment” (id.).
11

12 The ALJ included the following in the written decision regarding Dr. Clem:

13 Consultative examiner Dr. Clem opined that the claimant was capable of
14 simple, repetitive tasks, and also indicated that any social limitations would be
15 of a mild degree (Ex. 9F/4). These findings are generally consistent with the
16 residual functional capacity set out above. However, Dr. Clem also stated that
17 the claimant might experience some difficulty in performing work on a
18 consistent basis, given the likelihood of worsening depressive symptoms. He
19 opined that the claimant would likely experience some interruptions in
20 maintaining regular attendance due to exacerbations of depression, and
21 therefore he did not anticipate the claimant to overall deal well with the usual
22 stressors in a competitive workplace environment (Ex. 9F/5). Dr. Clem’s
23 opinion is not afforded significant weight. The record shows that the
24 claimant’s depression has been relative mild and he has not received any
25 treatment aside from medications that he did not take continuously. Dr. Moore
26 noted the claimant’s report that his symptoms were better without medications
(Ex. 6F/20 [Tr. 208]). Dr. Clem himself assigned a global assessment of
functioning (GAF) score of 54, indicating only moderate symptoms or
moderate limitations, which does not support his opined limitations (Ex. 9F/4).
The record established that the claimant’s depression has been stable and that
he does not require medications to control his symptoms. I therefore do not
afford significant weight to Dr. Clem’s opined limitations resulting from
supposedly ‘worsening’ depression, as the rest of the record is inconsistent
with his opinion.

(Tr. 22).

1 First, when a mental impairment is involved, assuming that a failure to comply with
2 prescribed treatment suggests a willful failure to comply with prescribed treatment can be
3 illogical. See Van Nguyen, supra, 100 F.3d at 1465. A person suffering from a mental illness or
4 mood disorder such as that suffered by plaintiff here, may not realize that he needs his
5 medication, or he may not even realize that his “condition reflects a potentially serious mental
6 illness.” Id. In addition, a failure to comply continuously with treatment does not call into
7 question the severity of plaintiff’s complaints when the record reflects that the prescribed
8 treatment was unsuccessful at treating plaintiff’s complaints (see Tr. 16-17, 217, 220). The Court
9 concludes that in this particular circumstance, the ALJ not provide substantial support for the
10 decision to discredit the opinion of an examining physician who specifically noted multiple
11 unsuccessful attempts by plaintiff to obtain relief from his symptoms with treatment, on the basis
12 that plaintiff “has not received any treatment aside from medications that he did not take
13 continuously.” See id.

16 Furthermore, Dr. Clem was aware of these factors, conducted a mental status
17 examination and nevertheless opined that plaintiff suffered from several work-related limitations.
18 The Court notes that “experienced clinicians attend to detail and subtlety in behavior, such as the
19 affect accompanying thought or ideas, the significance of gesture or mannerism, and the
20 unspoken message of conversation. The mental status examination allows the organization,
21 completion and communication of these observations.” Paula T. Trzepacz and Robert W. Baker,
22 *The Psychiatric Mental Status Examination 3* (Oxford University Press 1993). The ALJ does not
23 explain adequately why his assessment, including a characterization of plaintiff’s depression as
24 “mild,” is more correct than that of Dr. Clem, an examining physician. This was legal error, as
25 the ALJ must explain why his interpretations are correct over those of the doctor. See Reddick,
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1 supra, 157 F.3d at 725. For these reasons, the Court does not find substantial support for the
2 ALJ's decision not to assign significant weight to the opinion by examining physician Dr. Clem
3 from the characterization by the ALJ of plaintiff's depression as "mild," or from the fact that
4 plaintiff did not consistently take medications that may not have afforded him any symptom
5 relief.
6

7 The ALJ also supports the lack of significant weight given to Dr. Clem's opinions about
8 plaintiff's multiple functional limitations on the basis that Dr. Clem's assignment of a GAF of
9 54, indicating moderate symptoms, does not support Dr. Clem's opined limitations (Tr. 22).
10 However, the ALJ does not find that a GAF of 54 necessarily is inconsistent with the multiple
11 areas of functional limitation found by Dr. Clem, and, indeed the Court concludes based on the
12 relevant record that it is not. The GAF represents, by definition, a global assessment of
13 functioning, and plaintiff's GAF of 54 likely includes an assessment of areas in which plaintiff
14 suffers greater limitation than a functional rating of 54 would warrant, and areas in which
15 plaintiff suffers a lesser limitation than a functional rating of 54 would warrant. A GAF of 54
16 does not indicate that in each and every aspect of functioning plaintiff's rating is exactly 54. The
17 Court concludes that, based on a review of the relevant record, Dr. Clem's opinions regarding
18 plaintiff's functional limitations are consistent with the relevant record, and are consistent
19 specifically with a global assessment of functioning rating of 54. Therefore, the Court finds that
20 this reason by the ALJ does not provide substantial support for the ALJ's decision to discount
21 Dr. Clem's opinions.
22

23
24 The decision not to assign significant weight to Dr. Clem's opinions also was based on
25 the ALJ's characterization of plaintiff's depression as "stable," which does not provide
26 substantial support for the assignment of lesser weight, and on the ALJ's conclusion that plaintiff

1 does not require medication to control his symptoms, apparently based on the March 3, 2004
2 assessment by Dr. Donna E. Moore, M.D. (hereinafter “Dr. Moore”) (see Tr. 22, 208).

3 The Court observes that Dr. Moore examined plaintiff many times, including two months
4 after the March 3, 2004 assessment (Tr. 207). On June 8, 2004, Dr. Moore diagnosed plaintiff
5 with depression, and concluded that plaintiff was “obviously very depressed” (id.). She also
6 noted that plaintiff could not afford to take Effexor at that point in time (id.). The Court notes
7 that the ALJ failed to note this potential reason documented in the record as to why plaintiff may
8 not have been taking his medications continuously. In addition, the Court finds that Dr. Moore’s
9 assessment on March 3, 2004 that plaintiff’s depression was better is likely to reflect a temporary
10 situation, as demonstrated by her finding two months later that he was “obviously very
11 depressed” (Tr. 207, 208; see also Tr. 197). On March 23, 2005, Dr. Moore diagnosed plaintiff
12 with “reactive depression” and concluded that “we’ve tried Zoloft, Effexor and Doxepin without
13 any relief” (Tr. 197). In another section of the decision, the ALJ noted that Lexapro also was
14 prescribed for plaintiff’s depression but was found to be ineffective (see Tr. 16). The Court
15 concludes that the ALJ’s reliance on the March 3, 2004 report of Dr. Moore to support the
16 conclusion that plaintiff’s depression was “stable” and furthermore to support the conclusion that
17 “the rest of the record is inconsistent with” Dr. Clem’s opinion regarding plaintiff’s functional
18 limitations was without substantial evidence in the record as a whole.
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21 For the aforesaid reasons, the Court concludes that the ALJ failed to evaluate properly the
22 medical evidence supplied by examining physician Dr. Clem and did not provide legitimate
23 reasons to discount his opinions. See Lester, supra, 81 F.3d at 830-31. This legal error is an
24 independent basis to reverse and remand this matter to the administration for further
25 consideration.
26

1 CONCLUSION

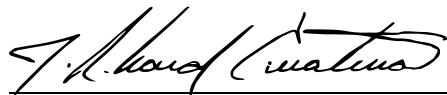
2 The ALJ failed to consider properly the lay testimony by failing to provide reasons
3 germane to the testimony of plaintiff's mother and wife sufficient to reject these opinions. The
4 ALJ also committed legal error when evaluating the medical evidence by substituting his own
5 interpretation of the medical evidence over that of examining physician Dr. Clem and by failing
6 to provide specific and legitimate reasons to reject Dr. Clem's opinions.
7

8 Therefore, this matter should be **REVERSED** and **REMANDED** to the administration
9 for further consideration.

10 Because of these aforesaid errors, the administrative law judge on remand should
11 reevaluate the record anew as a whole, make a new, full, sequential disability evaluation and
12 issue a new decision.
13

14 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
15 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
16 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
17 review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
18 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **July 8, 2011**,
19 as noted in the caption.
20

21 Dated this 15th day of June, 2011.
22

23 

24 J. Richard Creatura
25 United States Magistrate Judge
26